

This Opinion is not a
Precedent of the TTAB

Mailed: September 30, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re GK Legacy Foundation
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Serial No. 88449012
—

David G. Bray of Dickinson Wright PLLC,
for GK Legacy Foundation.

Brittany Cogan, Trademark Examining Attorney, Law Office 114,
Laurie Kaufman, Managing Attorney.

—
Before Taylor, Adlin and Johnson,
Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

GK Legacy Foundation (“Applicant”) seeks registration on the Principal Register of the mark KEEP YOUR CHIN UP SCHOLARSHIP FUND and design, as shown below,

keep your chin ↑
Scholarship Fund

for:

Charitable foundation services, namely, providing fundraising activities, funding scholarships and/or

financial assistance for adults returning to college in
International Class 36.¹

The wording SCHOLARSHIP FUND is disclaimed, and the application includes the following description: “The mark consists of the underlined words ‘keep your chin up’ with the ‘u’ in the word ‘up’ featuring an upward arrow; the words ‘scholarship fund’ appear on the next line below with a horizontal line above.” Color is not claimed as a feature of the mark.

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used on or in connection with the identified goods, so resembles the mark in Registration No. 5946084, THE CHIN UP FOUNDATION and design (FOUNDATION disclaimed), shown below,



for “Charitable services, namely, coordination of non-monetary contributions to charities and non-profits” in International Class 35,² as to likely to cause confusion, to cause mistake, or to deceive.

¹ Application Serial No. 88449012 was filed on May 28, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as May 3, 2019.

² Registration No. 5946084 issued December 24, 2019. The registration includes the following description: “The mark consists of the wording ‘THE CHIN UP FOUNDATION’ where the

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. Both Applicant and the Examining Attorney filed briefs and Applicant filed a reply brief.³ We affirm the refusal to register.⁴

I. Applicable Law

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). We discuss these below. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019) (Board considers each *DuPont* factor for which there is evidence and argument). Two key considerations in any

wording ‘THE’ and ‘FOUNDATION’ is in black and the wording ‘CHIN UP’; above the wording is a design of two faces, one in red and one in white, both looking at a white sun within a black circle.” The colors red, black and white are claimed as a feature of the mark.

³ Embedded in the body of its reply brief, Applicant provides hyperlinks to two idiom definitions purportedly to establish alleged weakness in the terms “Chin Up” and “Keep Your Chin Up.” *See* Applicant’s Reply Brief, p. 1. 11 TTABVUE 4. Providing only a web address or a hyperlink without the material attached does not make the material that might be found on that website of record. *See In re Planalytics Inc.*, 70 USPQ2d 1453, 1457 (TTAB 2004); *see also In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1050 (TTAB 2006) (in the ex parte context, web site links “do little to show the context within which a term is used on the web page that could be accessed by the link.”). Accordingly, we give no further consideration to these website hyperlinks.

⁴ Page references herein to the application record are to the downloadable .pdf version of the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs and orders on appeal are to the Board’s TTABVUE docket system. Where applicable, complete urls can be found at the TSDR cite.

likelihood of confusion analysis are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

II. Discussion

A. The Services and Classes of Consumers

We now compare the services under the second *DuPont* factor. In making our determination regarding the relatedness of the services, we must look to the services as identified in Applicant's application and the cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *see also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). "This factor considers whether 'the consuming public may perceive [the respective services of the parties] as related enough to cause confusion about the source or origin of the goods and services.'" *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014).

Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant services are used together or used by the same purchasers; advertisements showing that the relevant services are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both applicant's services and the services listed in the cited registration. *See, e.g., In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for

the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). The issue is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to their source. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984).

Under this *DuPont* factor, we need not find similarity as to every service listed in the recitation. It is sufficient for a refusal based on likelihood of confusion that the Examining Attorney establish relatedness for any item encompassed by the identification of services in a particular class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (“[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.”).

As noted above, Applicant’s identified services are “charitable foundation services, namely, providing fundraising activities, funding scholarships and/or financial assistance for adults returning to college” and Registrant’s services are “charitable services, namely, coordination of non-monetary contributions to charities and non-profits.” The Examining Attorney maintains that the services are related because the same entity commonly provides services of the types recited in the respective identifications under the same mark. In support of her position, the Examining

Attorney submitted Internet evidence demonstrating that Catholic Charities awards scholarships and facilitates food donations to enable it to provide food assistance under the Catholic Charities mark⁵; The Dollywood Foundation offers scholarships, fund raises and organizes a book collection and gifting program⁶; Goodwill offers scholarships for educational advancement and provides donation collection points for non-monetary items, such as clothes and household items⁷; and Volunteers of America provides both college scholarships and facilitates a youth backpack program, through which needy school children are provided with backpacks filled with school supplies.⁸

We initially find that Applicant's and Registrant's services are related and complementary solely on the face of the respective identifications. We find so because, as identified, both Applicant's provision of fundraising activities and funding of scholarships, and Registrant's coordination of non-monetary contributions to charities, serve the same goal or purpose, albeit through different means, of providing ways for potential donors to make charitable donations. *See In re Iolo Technologies, LLC*, 95 USPQ2d at 1500 ("Here, based on the identifications themselves, we find that applicant offers a product that is complementary in function and purpose to the [services] offered by registrant.")

⁵ September 16, 2020 Final Office Action, TSDR 5-8 (www.catholiccharities.dc.org).

⁶ *Id.* at TSDR 9-12. (<https://imaginationlibrary.com>).

⁷ *Id.* at TSDR 14-18. (www.goodwill.org).

⁸ *Id.* at TSDR 26-28. (www.voa.org). We have not considered the webpages from the Rotary Foundation because they do not show use of a single mark in connection with the provision of services of the types identified in both Applicant's application and the cited registration.

We further find the internet evidence sufficient to show that Applicant's charitable services of providing fundraising activities and funding scholarships for adults returning to school are related to Registrant's non-monetary charitable services, such services being highly related charitable services that are often offered by the same source under the same mark. *See, e.g., In re Detroit Athletic*, 128 USPQ2d at 1051 (relatedness supported by evidence that third parties sell both types of goods under same mark, showing that "consumers are accustomed to seeing a single mark associated with a source that sells both."); *In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012) (Internet excerpts from "several third-party car dealerships offering 'tires' for sale on their websites" was "evidence that consumers expect to find both 'tires,' . . . "and 'automobiles' . . . emanating from a common source."). Notably, Applicant's brief is silent on this factor.

During prosecution, Applicant argued that the services were not related because Applicant provides "monetary fundraising" whereas the cited registration limits the services to "coordination of non-monetary contributions to charities and non-profits."⁹ We find this argument unavailing. The services need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be "related in some manner and/or if the circumstances surrounding their marketing are such that they

⁹ Applicant's February 19, 2020 Response, TSDR 2, 6; Applicant's August 26, 2020 Response, TSDR 1, 4.

could give rise to the mistaken belief that the goods [or services] emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). Here, as the record demonstrates, consumers are accustomed to seeing a single mark associated with both types of charitable services.

Accordingly, we find the respective charitable services related for purposes of our likelihood of confusion analysis.

Furthermore, because there are no limitations as to channels of trade or classes of purchasers in Applicant’s or Registrant’s recitation of services, we must presume that Applicant’s and Registrant’s services, which include providing and/or facilitating charitable assistance, move in all usual channels of trade for these services and are offered to the usual classes of purchasers of the services which, in this case, include ordinary consumers seeking to participate in (or benefit from in the case of Applicant’s services) both monetary and non-monetary charitable activities. *See In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). We accordingly find the classes of consumers overlap.

The *DuPont* factors concerning the relatedness of the services, channels of trade and classes of purchasers weigh in favor of finding that confusion is likely.

B. Conditions of Sale

Applicant maintains that given the specialized nature of the respective services, – Applicant’s being financial assistance for adults returning to college and Registrant’s being coordination of non-monetary contributions to charities – they will

be purchased with great care by sophisticated consumers. More specifically, Applicant argues that:

Applicant's services are financial assistance for adults returning to college. These services are generally provided to a specific type of adult consumer returning to college seeking assistance with college expenses. Given the type of services provided, the great expense of college tuition, and the education level of the targeted consumers of such services, great care is implemented by consumers to ensure their financial assistance package for their return to college is the most comprehensive as possible.

Registrant's services have very particularized purposes of "coordination of *non-monetary* contribution to charities and non-profits" (emphasis added). The consumer of Registrant's services are not individuals as is the case with Applicant's services; rather the consumers of Registrant's services are sophisticated charitable businesses who must know a great level of detail about their donors to survive and prosper.

Applicant's brief, p. 9.¹⁰

As identified, the target recipient of Applicant's scholarships are adults returning to college. However, there is no evidence of record that these college-returning adults will exercise more than ordinary care in seeking scholarship opportunities. In addition, neither Applicant's identified fundraising activities, including funding scholarships nor Registrant's coordination of non-monetary charitable contribution services contain any limitations as to classes of consumers, and therefore, they are not limited to sophisticated consumers, e.g., sophisticated charitable businesses. Instead, the respective services will be available to all interested consumers,

¹⁰ 8 TTABVUE 9.

including ordinary ones. Accordingly, while some consumers may be discriminating and exercise care in their choice of charitable activities in which to participate, others may not exercise as great a degree of care. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) (the standard of care for purchasing the goods is that of the least sophisticated potential purchaser).

To be clear, Applicant has focused on the recipients of its scholarships, as opposed to the other consumers to whom Applicant offers its monetary fundraising and funding scholarship services, i.e., donors. As identified, however, the consumers of Applicant's monetary-based charitable services (as well as those of Registrant's non-monetary-based charitable services) include the donors who seek to contribute money, goods and time and, as just stated, these donors would include ordinary consumers.

Nevertheless, even if we were to assume that some of the consumers of both Applicant's and Registrant's services exercise more than ordinary care, even knowledgeable and careful consumers are not immune to source confusion. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers ... are not infallible.")).

We accordingly find this *DuPont* factor neutral.

C. Similarity or Dissimilarity of the Marks

1. Strength of the Cited Mark

To evaluate the inherent or conceptual strength of the cited mark, “we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary (or fanciful) continuum of words.” *In re Davia*, 110 USPQ2d at 1815. “Marks that are descriptive or highly suggestive are entitled to a narrower scope of protection, i.e., are less likely to generate confusion over source identification, than their more fanciful counterparts.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 75 (Fed. Cir. 2015).

Applicant contends that “CHIN UP’ is weak for at least the reason that it is frequently used in the consumer context in general.” Applicant’s brief, p. 5.¹¹ To support her position, Applicant references a listing from the USPTO’s Trademark Electronic Search System (TESS) database of 13 live applications and registrations for marks that included the term “CHIN UP,” 11 of which it purports are active registered marks.¹²

The Examining Attorney, however, maintains that none of the third-party registrations have been made of record. She particularly explains that in her Final Office Action, she advised Applicant that the mere submission of a list of registrations does not make such registrations part of the record, and that to make those third party registrations part of the record, Applicant must submit copies of the

¹¹ 8 TTABVUE

¹² Applicant’s February 19, 2020 Response, TSDR 11.

registrations, or the complete electronic equivalent from the USPTO's automated systems, prior to appeal. Applicant did not do so. Accordingly the third-party registrations are not properly of record, and we give them no further consideration.¹³

Applicant also submitted a definition from the CAMBRIDGE ENGLISH DICTIONARY, which defines “chip up!” as “something you say to someone in a difficult situation in order to encourage them to be brave and try not to be sad[.]”¹⁴ We acknowledge that the phrase “chin up” has an understood meaning, but the record does not establish a sufficient nexus between encouraging language and the provision of charitable services, to ascribe a degree of weakness to that portion of the cited mark that would make confusion unlikely.

Besides, the record evidence shows that the only marks that incorporate the term “Chin Up,” and which cover charitable services, are Applicant's applied-for mark and the cited registered mark. Accordingly, we accord the phrase “chin-up” in the cited mark the usual, or slightly less, scope of protection given an inherently distinctive term.

¹³ The Examining Attorney alternatively addressed the third-party applications and registrations, in part, noting that: “[A]ssuming arguendo, that Applicant had properly submitted the third-party registrations into the record ... [n]one of the ... applications/registrations pertain to the charitable services at issue. We remind Applicant that while third-party registrations may be relevant to prove that some segment of a composite mark has a normally understood meaning leading to the conclusion that that segment is weak, *see Juice Generation v. GS Enters.*, 115 USPQ2d at 1675, third-party registrations “featuring goods and/or services dissimilar or unrelated to those in the application and the cited registration are of little probative value such weakness.” *See Omaha Steaks Int'l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”).

¹⁴ Applicant's February 19, 2020 Response, TSDR 12 (<https://dictionary.cambridge.org.us>, accessed February 19, 2020).

2. The Marks

We next consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Stone Lion*, 110 USPQ2d at 1160; *DuPont*, 177 USPQ at 567. We do not predicate our analysis on a dissection of the involved or cited marks; we consider the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1160; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). However, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs.*, 101 USPQ2d at 1721 (citation omitted). *See also San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). The average consumers in this case include ordinary persons seeking to contribute to

(or benefit from in the case of Applicant's services) both monetary and non-monetary charitable activities and services.

We compare Applicant's composite word and design mark, ,

with the cited composite word and design mark . We initially find that the phrase CHIN UP is the dominant portion of both Applicant's applied-for mark and the cited mark.

As to Applicant's mark, the wording SCHOLARSHIP FUND has little to no source-indicating significance; the wording SCHOLARSHIP FUND is descriptive and has been disclaimed. As such, this term is entitled to less weight in our determination. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (descriptive terms are properly given less weight). Also, the wording visually is considerably small than the remaining elements in the mark. The upward arrow design, comprising a portion of the letter "U" in the word "UP," is hardly noticeable, given the merging of the arrow shaft with one of the straight sides of the letter "U," and merely reinforces the meaning of the word "UP." Similarly, the underlining merely separates the phrase "KEEP YOUR CHIN UP" from the descriptive wording "SCHOLARSHIP FUND," without lending much, if anything, to the overall commercial impression. Moreover, where both words and a design comprise a mark, the words are normally accorded greater weight because they are more likely to make an impression upon purchasers, would be remembered by them, and would be used

by them to call for or discuss the services. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (citing *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) (“in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed”)).



As to the cited mark, , as the Board has repeatedly found, the word “the” is generally perceived, as it is in this case, as merely the common article that it is, without trademark significance. *See, e.g., In re G.D. Searle & Co.*, 149 USPQ 619 (CCPA 1966), *aff’g* 143 USPQ 220 (TTAB 1964) (THE PILL); *In re King Coil Licensing Co.*, 79 USPQ2d 1048, 1051 n.6 (TTAB 2006) (THE BREATHABLE MATTRESS); *In re Weather Channel, Inc.*, 229 USPQ 854, 856 (TTAB 1985) (THE WEATHER CHANNEL); *Conde Nast Publications Inc. v. The Redbook Publishing Co.*, 217 USPQ 356, 357 (TTAB 1983) (THE MAGAZINE FOR YOUNG WOMEN). Similarly, the word FOUNDATION imparts little source-identifying significance, as it is merely descriptive and has been disclaimed.

Regarding the design elements, as just stated, it will be the words rather than colors and designs in the mark that will be used to call for and discuss Registrant’s services. The design elements, while clearly noticeable, showing two abstract faces within a black circle looking up with their “chin(s) up” towards the white sun, merely enforcing the CHIN UP wording of the mark.

Comparing the marks in their entireties, as we must, we find them similar in appearance, sound, and connotation in that they both include, as dominant portions, the literal phrase CHIN UP. Further regarding connotation, on this record, and given the similarity of the respective services, the phrase CHIN UP conveys the same meaning in both Applicant's and the cited mark, i.e., an encouragement to someone in a difficult situation. Moreover, given the structure and syntax of Applicant's mark, the words "KEEP YOUR" merely modify and personify Applicant's mark. It is not distinguishing; it is the term CHIN UP that consumers will perceive as the dominant literal element.

The arrow and underlining design elements in Applicant's mark also are simply not sufficiently striking to convey a distinguishing commercial impression. Therefore, despite Applicant's contention to the contrary, we find little difference in the connotations and commercial impressions between the marks.

While as Applicant points out, there are differences between the marks when viewed on a side-by-side basis, we find that in their entireties, they are more similar than dissimilar due to the shared phrase CHIN UP. Indeed, it is not unlikely that consumers of both Applicant's and Registrant's services may well believe that the marks are simply variants of one another, used by a single entity to identify and distinguish complementary and related services. *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985).

The *DuPont* factor of the similarity of the marks thus also favors a finding of likelihood of confusion.

D. Conclusion

We find that confusion is likely between Applicant's composite word and design

mark  for the identified charitable services, and the cited

composite word and design mark  for the recited charitable services. We conclude so principally due to the similarity of the marks, the related and complementary nature of the services and the overlapping trade channels and classes of consumers.

Decision: The refusal to register Applicant's mark  under Section 2(d) of the Trademark Act is affirmed.